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December 24, 2009

By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445-12th Street SW
Washington, D.C. 20554

Re: Petition for Protection from Whipsawing and Stop Settlement Payment
Order on the U.S.-Tonga Route
IB Docket No. 09-10

Dear Ms. Dortch:

REACH Services (USA) Inc. and its affiliates ("REACH"), by its attorneys, hereby responds to the December 15, 2009 request of Digicel (USA), Inc. ("Digicel USA") for access to the information that REACH submitted to the International Bureau (the "Bureau") on March 3, 2009 ("March 3 Submission") concerning REACH's IMTS service on the U.S.-Tonga route. REACH submitted this information in response to the February 18, 2009 request of the Bureau (the "Bureau Letter") and with a request for confidential treatment pursuant to Sections 0.457 and 0.459 of the Commission's rules.¹ REACH objects to Digicel USA's request and asks that the Commission deny the request for the following reasons.

As REACH explained in its request for confidential treatment, the March 3 Submission contains specific information about REACH's internal business operations. This information is non-public financial and commercial information that is not ordinarily disclosed to unrelated third parties, because this information could be used by competitors or others to harm REACH. Accordingly, the information qualifies for confidential treatment under Exemption 4 of

¹ 47 C.F.R. §§ 0.457, 0.459.

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the Freedom of Information Act ("FOIA").² REACH notes that Digicel USA in its Request does not challenge REACH's conclusions regarding the eligibility of this information for confidential treatment.

Digicel USA asks that the Commission release REACH's confidential information pursuant to a protective order.³ REACH submits that the Commission's criteria for such restricted release of confidential information are not satisfied in this case. In its Order denying AT&T's request for access, under a protective order, to information provided by Tonga Communications Corporation ("TCC") in this proceeding, the Bureau held that there is a strong presumption of confidential treatment for information qualifying under Exemption 4 when the information was submitted voluntarily and disclosure of the information would jeopardize the Commission's ability to obtain such data on a cooperative basis.⁴ The Bureau was unwilling to tip the balance in favor of disclosure in that instance, because of concerns about the potential chilling effect on the willingness of foreign carriers to provide information to the Commission in the future, and because the information was not necessary for the Bureau to reach its decision on the stop payment order.⁵ Despite Digicel USA's assertions to the contrary, these same considerations are present in this case, and thus justify a denial of Digicel USA's request for access to REACH's information, even under a protective order.

First, REACH's March 3 Submission was voluntary, not mandatory as Digicel USA suggests.⁶ The Bureau Letter "requests" that REACH provide certain information – it does not "order" or "require" REACH to respond, cite specific legal authority in support of a mandate, or threaten REACH with fines and forfeitures for failure to respond.⁷ The fact that the Bureau may have the authority to require REACH to produce the information is not sufficient for the

² See 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d). Exemption 4 allows parties to withhold from public information "trade secrets and commercial or financial information obtained from any person and privileged or confidential-categories of materials not routinely available for public inspection." Applying Exemption 4, the courts have stated that commercial or financial information is confidential if its disclosure will have either of the following effects: (1) impairment of the government's ability to obtain necessary information in the future; or (2) causation of substantial harm to the competitive position of the person from whom the information was obtained.

³ Digicel USA request at 1.

⁴ *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route, Order*, 24 FCC Rcd 8026, 8029-8030 (2009) ("Order"), citing *Critical Mass Energy Project v. NRC*, 975 F.2d 871,873 (D.C. Cir. 1992).

⁵ *Id.* at 8030.

⁶ Digicel USA request at 3.

⁷ Bureau Letter at 1 ("We request that the following information be provided no later than March 2, 2009") (emphasis supplied).

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submission of the information to be deemed mandatory. Rather, the Bureau must exercise the authority as well.⁸ Since the Bureau did not exercise any authority it may have to require REACH to provide the requested information, REACH's March 3 Submission was voluntary.

Second, the information contained in the March 3 Submission was not necessary to the Bureau's determination that Digicel USA has "arrangements" with carriers in Tonga (presumably Digicel Tonga) that are subject to the Bureau's requirements to stop settlement payments to TCC and Digicel Tonga. Per Digicel USA's request, the Bureau based its determination regarding Digicel USA on the fact that the "information supplied in one or more of the responses by U.S. carriers to the Bureau's request for information had identified Digicel USA as a carrier through which the responding carrier(s) sent traffic indirectly to Tonga for termination."⁹ REACH's March 3 Submission does not mention Digicel or include Digicel-specific information. Accordingly, REACH's March 3 submission was not relevant to the Bureau's decision regarding Digicel USA.

Finally, the public interest in this case requires that REACH's confidential information be withheld from release to Digicel USA, even pursuant to a protective order. REACH is a U.S. carrier, but it is foreign-owned and provides service in many foreign countries in competition with Digicel. As the Bureau recognized in its Order, releasing confidential information under a protective order could have a potential chilling effect on the willingness of foreign carriers to provide information to the Commission in the future, and thus could hinder the U.S. Government's ability to make and implement U.S. policy governing international telecommunications services as well as resolve disputes with foreign carriers and their governments going forward.¹⁰

Thus, the Commission should deny Digicel USA's request for access to REACH's March 3 Submission. Should the Commission determine that REACH has not provided sufficient basis to reject Digicel USA's request, REACH asks that the Commission give REACH the opportunity to withdraw the information. Digicel USA cannot reasonably justify seeking the release of information, even pursuant to a protective order, that is no longer on the record in this proceeding and will play no role in any decision the Commission might reach.

Lastly, should the Commission determine that REACH's confidential information cannot be withdrawn at this point, then REACH requests that the Commission modify its model protective order to expressly prohibit release of the information to any person (including legal

⁸ See *Inner City Press/Community on the Move v. Board Gov. Fed. Res. Sys.*, 463 F.3d 239, 247-248 (2nd Cir. 2006).

⁹ Digicel USA request at 2.


¹⁰ Order at 8030.

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counsel) that has been or will be involved in any way, directly or indirectly, in the establishment of termination arrangements. REACH assumes that the Commission will withhold its confidential information from release until REACH has had an opportunity to exhaust its appeal rights. *See Cincinnati Bell Telephone Company Tariff F.C.C. No. 45, 10 FCC Rcd 10574, Attachment (1995).*

Respectfully submitted,

REACH Services (USA) Inc.

By: 
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CERTIFICATE OF SERVICE

I, Winifred Brantl, hereby certify that copies of the foregoing Digicel (USA), Inc. Request for Protective Order were delivered via e-mail on this 24 day of December, 2009 to the following:

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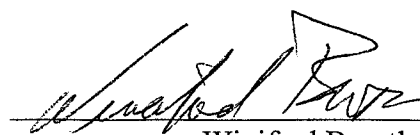
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